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January 26, 1995

John P. Caffrey, Chairman
State Water Resources Control Board
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DRAFT WATER QUALITY CONTROL PLAN FOR THE BAY AND DELTA

This letter provides our comments and recommended modifications with respect to the December, 1994, Draft Water Quality Control Plan for the Bay and Delta. Our comments focus specifically on dissolved oxygen (DO) objectives for the San Joaquin River.

Technical studies which the City has conducted confirm many of the draft Plan's conclusions with regard to DO; specifically, that ambient water quality conditions are a function of numerous factors in combination. Stockton's wastewater discharge is one of the factors affecting water quality, but the effect of the discharge is magnified by the flow regime in the river. In particular, when reverse or no flow conditions occur during export pumping, the assimilative capacity of the river is greatly diminished, and water quality objectives may be exceeded. The City's technical studies have amply demonstrated that, in the absence of reverse or no flow conditions, there would not be violations. In addition, if Stockton's wastewater discharge were completely removed from the river, violations would occur as a result of the existing flow regime of the river and other factors.

The City does not suggest that there be Plan amendments that would compel changes in flow conditions in the Delta. Nor does Stockton seek to be relieved of its obligation to do its fair share to address the DO problem. Rather, the City asserts that the Plan must treat all entities fairly and equitably in this regard. This objective can be accomplished through a simple revision in the Plan that makes it specific that a point source discharger may be afforded a reasonable period of time to construct facilities that may be necessary to address its proportionate share of the effort required to correct the DO problem. This approach to the resolution of this difficult issue would be consistent with the Plan's proposed phased and balanced implementation approach as it relates to other issues. (See draft Plan at pp. 4, 24.)

The City, to its surprise and dismay, was recently reissued a NPDES Permit for its wastewater discharge which imposes new and very stringent DO-related effluent limitations which are now impossible for it to meet. The City firmly believes this requirement places an unreasonable and disproportionate burden on the Stockton Metropolitan Region, but more importantly, the City

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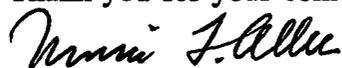
DRAFT WATER QUALITY CONTROL PLAN FOR THE BAY AND DELTA

and its wastewater users suddenly face ten years of unjustified potential violations of State and Federal law during the period of time required to design and construct the facilities necessary to meet this standard. The City's concern in this regard have compelled it to file an appeal of the recent Regional Board Order reissuing the NPDES Permit for its wastewater discharge, which is now pending before your Board.

The City's appeal will bring before your Board numerous technical and legal issues related to the discharge, the Regional Board's authority, interpretation of EPA policy, and other matters. In a very real sense, the appeal is an unfortunate demand on the limited resources of your Board. The Executive Officer of the Central Valley Regional Board has been very candid in expressing that he would have liked to have been able to recommend that the Regional Board grant Stockton a reasonable schedule to comply with the new, stringent DO requirements, but the Regional Board had no authority to grant a compliance schedule within the context of the NPDES Permit. The State Board can specifically provide this authority by a simple revision of the Plan.

I am therefore attaching two documents for your Board's consideration: 1) the specific modifications to the language of the Plan as proposed by the City of Stockton which would allow Regional Boards the authority to grant dischargers a schedule of compliance to achieve a new or higher standard within the context of a new or renewed NPDES Permit; and 2) detailed comments explaining the basis and need for the proposed revisions.

Thank you for your consideration of the City's comments.



MORRIS L. ALLEN
DIRECTOR OF MUNICIPAL UTILITIES

MLA:ma

enclosures

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CITY OF STOCKTON
SPECIFIC REVISIONS PROPOSED
FOR DECEMBER 1994 DRAFT SALINITY PLAN

Following are two alternative additions to the Salinity Plan to authorize schedules of compliance related to dissolved oxygen objectives. The first would amend the program of implementation in the Salinity Plan based on EPA guidance indicating that schedules may be authorized in the regulations implementing water quality standards. Alternative 2 is based on an interpretation or assumption that the water quality objective itself must include authorization for a schedule of compliance in order for such a schedule to be allowed. Stockton is primarily concerned that authority be established that satisfies requirements of the State Board and Regional Board, and therefore does not necessarily advocate one alternative over the other. (The City also desires that the authority ultimately exist with respect to both the 6.0 and 5.0 objective if possible.)

ALTERNATIVE 1

On page 26, add a new paragraph immediately before Section IV.B:

Because of the interrelated effects of flows, Delta hydraulics, discharges, and other factors, and consistent with the general approach to implementation, and because it is recognized that immediate compliance with dissolved oxygen objectives or effluent limitations based on objectives may not be feasible in all circumstances, it is appropriate in some circumstances to provide schedules of compliance with water quality objectives or effluent limitations in waste discharge requirements. Accordingly, in circumstances where it is infeasible for a discharger to comply with dissolved oxygen water quality objectives in this plan or in the Central Valley Basin Plan, the Regional Board shall establish in the NPDES permit/waste discharge requirements a schedule of compliance. These schedules authorized to implement dissolved oxygen objectives shall require reasonable progress toward the attainment of objectives or standards or toward limitations based thereon during the term of the permit, and contain a final compliance date based on the shortest reasonable time required to achieve compliance. In no event shall the schedule extend compliance beyond the date that is ten years after the date of adoption of this plan. The dissolved oxygen objectives in the San Joaquin River in the basin plan and in this plan are modified to incorporate and include this authorization.

ALTERNATIVE 2

Add a footnote accompanying the water quality objective for dissolved oxygen, to read as follows:

“If it is infeasible for a waste discharger to meet this objective immediately, a time extension or schedule of compliance may be granted, but this objective must be met no later than September 1, 2005.”

ATTACHMENT 2

CITY OF STOCKTON WRITTEN COMMENTS

RE: WORKSHOP - THE WATER QUALITY

PHASE OF THE BAY-DELTA ESTUARY PROCEEDINGS

INTRODUCTION

The City of Stockton respectfully presents these comments concerning the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Delta Plan"). Stockton is directly interested in the proposed Delta Plan, since the objectives laid out there will affect the terms and conditions of Stockton's permit to discharge treated wastewater into the San Joaquin River. Stockton submits these comments in the hope that the State Water Resources Control Board ("SWRCB") will include in the final Delta Plan specific authority allowing schedules of compliance in National Pollution Discharge Elimination System ("NPDES") permits and in Waste Discharge Requirements ("WDRs") with respect to dissolved oxygen objectives.

Stockton is faced with immediate liability for failing to meet certain effluent limitations its recently renewed NPDES permit. Stockton's particular predicament is based in part on idiosyncratic issues arising from its own circumstances, yet in a broader sense, Stockton's problem is not at all unique. Certainly the legal issues that created Stockton's predicament persist as precedent, and should be addressed in the form of revisions to the Delta Plan.

Stockton's comments suggest the Delta Plan needs further revisions to allow dischargers fair opportunity to comply with the new standards and objectives for the region. Such revisions are authorized by the Clean Water Act, by the federal regulations implementing the Clean Water Act, by California's Porter-Cologne Act, and by SWRCB's own regulations.

I. FACTUAL BACKGROUND

For many years, at least since 1975, the Water Quality Control Plan for the Sacramento and San Joaquin Rivers and Sacramento-San Joaquin Delta Basin (Basin Plan) has included a water quality objective for dissolved oxygen of 5.0 mg/l in Delta waters.¹ The City of Stockton for several decades has owned and operated a regional wastewater treatment plant which discharges into the San Joaquin River. Beginning in 1970 and continuing through 1981, Stockton, using federal, state and local funds, spent \$50 million to construct additions to its main plant as well as adding new tertiary treatment facilities. With the new facilities, Stockton operated in compliance with effluent limitations in the WDRs for Biochemical Oxygen Demand (BOD) in its NPDES permits issued by Regional Board Orders No. 78-105 and 86-115.²

Stockton's previous NPDES permit acknowledged the presence of reverse flows occurring periodically in the San Joaquin River, as well as the adverse effect of flow on water quality in the region. The attainment of water quality objectives for dissolved oxygen in receiving water has been difficult, due to the multiple factors that affect dissolved oxygen levels.

¹ Recently the Basin Plan was amended *inter alia* to conform to the Salinity Plan by establishing a 6.0 mg/l dissolved oxygen objective in the San Joaquin River from Turner Cut to Stockton in the fall.

² To avoid unnecessary burdens on the record, Stockton asks the Board to take official notice of the referenced permits. In any event, the permits are also part of the record of the administrative appeal discussed below.

In 1991, the SWRCB adopted the Salinity Plan. The Salinity Plan included a water quality objective for dissolved oxygen of 6.0 mg/l in the San Joaquin River between Turner Cut and Stockton during the period of September 1 through November 30, annually. The Salinity Plan, like the permits mentioned above, identified multiple factors affecting dissolved oxygen. The Salinity Plan focused on options for managing flow in the San Joaquin River. In the environmental analysis portion of the Salinity Plan, the SWRCB certified the implementations selected would result in no new costs to utilities, including sewerage facilities. (Salinity Plan, Table 6-5, § II(6).)

Also in 1991, the RWQCB staff and Stockton began negotiations concerning new effluent limitations to be included in Stockton's next renewed NPDES permit. At that time, the RWQCB staff approved in concept Stockton's plans to expand its treatment plant and to upgrade the plant's seismic stability. Stockton also proposed at its expense a water quality model to better understand the factors affecting the San Joaquin River's water quality. Stockton consulted extensively with RWQCB staff on the model's design and the desired output.

In 1993, the model was completed. The model's simulations demonstrate the direct effect of flow reversals and reduced flows in lowering the receiving water's dissolved oxygen level. (Exhibit A.) This relationship is tied to the presence of export pumping for the Central Valley Project and State Water Project. (Exhibit B.) (See also SWRCB's early recognition of this relationship in SWRCB Decision (1978) D-1485, especially ¶4 at p. 23.) In addition, the model demonstrates seasonal temperature variations exacerbate the lowering of dissolved oxygen. (Exhibit A.) While the model

unquestionably confirmed that a problem with low dissolved oxygen exists in the reach of the San Joaquin River near Stockton's treatment plant, it did not demonstrate that changes in Stockton's operations would significantly improve the quality of the receiving water. In fact, the model indicates that if Stockton were to cease discharging entirely, during certain seasons of the year there would be no improvement in the quality of the receiving water. (See RWQCB Order No. 94-324, p. 4, ¶14.) Moreover, the modelers believe the model tends to over-predict Stockton's impact.

In 1994, Stockton was issued a new permit with substantially more stringent dissolved oxygen-related limitations. This appears to have been based on two factors: (1) interpretation of model simulations; and (2) interpretation of legal requirements. This resulted in a permit containing requirements which Stockton cannot possibly meet for several years, and Stockton faces the potential of years of violation of state and federal law.

With regard to technical issues, the RWQCB relied on model simulations to conclude that Stockton's contribution to reduced levels of dissolved oxygen is significant. (See exhibit C, graph of simulations; see also RWQCB Order No. 94-324 p. 3, ¶ 14.) Stockton had encouraged the RWQCB to rely on available actual data. In any event, the RWQCB order issuing the new NPDES permit established new effluent limitations in the WDRs, for Carbonaceous Biochemical Oxygen Demand (CBOD) and ammonia.³ The

³ These are now set at 20 mg/l for a monthly average from December through March 31, and at 10 mg/l for the monthly average from April 1 through October 31, annually. Previous permits contained corresponding WDRs of 30 mg/l on a 30-day average and 50 mg/l for a daily maximum of Biochemical Oxygen Demand. (RWQCB Order No. 78-105, p. 3, and RWQCB Order No. 86-088, p. 3.) During August through October, the permit tightened the effluent limitations for BOD to 10 mg/l monthly average and 30 mg/l daily maximum, except when San Joaquin River flows exceeded 3,000 cubic feet per second (cfs). (RWQCB Order No. 86-088, p. 4.)

new limitation is substantially more stringent than found in any of Stockton's previous NPDES permits, and will require construction of new facilities before Stockton will be capable of complying.

Stockton also believes that modifications in Delta Flow conditions caused by the new Salinity Plan and recently revised operations of diversion and export projects may affect the determination of the appropriate effluent limitations for the discharge. An analysis of this issue has not been completed. However, Stockton believes it essential that this issue be investigated before the commitment of tens of millions of dollars to effluent limits that may be unnecessary.

II. LEGAL ISSUES RELATED TO REVISION OF THE PLAN AMENDMENT

Stockton's 1994 NPDES permit does not include a schedule of compliance allowing time for Stockton to construct facilities needed to meet the more stringent WDRs. The RWQCB apparently concluded that compliance schedules are not allowed where the applicable water quality standard does not explicitly authorize them or include the schedule authorization within them. The basis for this conclusion was an interpretation of the Salinity Plan and Basin Plan as constrained by the EPA administrative decision in *Starkist Caribe, Inc.*, NPDES Appeal No. 88-5. The *Starkist* decision holds "the only instance in which the [NPDES] permit may

In addition, the new permit established WDRs for ammonia, with effluent limitations effective April through October of 2 mg/l monthly average and 5 mg/l daily maximum. In November, the ammonia effluent limitations are altered to allow 10 mg/l monthly average and the daily maximum is eliminated.

lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance." (*Starkist*, at p. 5.)

In the context of the NPDES permit process Stockton has argued the conditions of *Starkist* were met in that (a) the Salinity Plan could be "fairly construed" to permit schedules of compliance, and (b) the California statutes and regulations implementing the plan (Wat. Code, § 13263; Cal. Code Regs., tit. 23, § 2235.2) expressly authorize schedules of compliance. These arguments are set forth in part in Exhibit D, and for the sake of brevity are not repeated here. Disagreement over this legal issue forms part of the basis for an appeal now pending before the State Board. (No. A-937.) Stockton does not seek here to persuade the SWRCB of the correctness of Stockton's legal position. Rather, Stockton's recommendation essentially defers to the RWQCB's interpretation, asking that the SWRCB create the specific authority that the RWQCB regarded as lacking previously.

The *Starkist* decision observed that states may include schedules of compliance in their NPDES permits "if a state has laid the necessary groundwork." (*Starkist, supra*, at p. 9.) It is that groundwork which Stockton urges SWRCB to lay in this Water Quality Control Plan.

Summarizing the pertinent analysis of the *Starkist* decision, a state may establish schedules of compliance for new or revised post - July 1, 1977 state water quality objectives. As shown above, the dissolved oxygen objectives affecting the San Joaquin River have been modified post-1977 in

both the Basin Plan and the Salinity Plan. As the Administrator put it, "It is up to the States . . . to decide whether their water quality standards should be applied in a flexible manner." (*Starkist, supra*, at p. 17.) Schedules of compliance should be authorized by the states in their continuous planning process for water quality under section 303 of the Clean Water Act. (*Id.* at p. 12.) Stockton respectfully urges the SWRCB to include in the Salinity Plan specific authority for schedules of compliance. If such authority is not included, Stockton, which has been in full compliance with its permit requirements, will be penalized by both the interpretation of *Starkist* and an inflexible system.

III. CALIFORNIA'S WATER QUALITY STANDARDS ARE TO BE APPLIED IN A FLEXIBLE MANNER

Stockton has argued before the RWQCB, as cited above, that California's applicable water quality plans already implicitly provide for flexibility in attaining water quality objectives. The Salinity Plan contains extensive language indicating the SWRCB expected the objectives therein to be met over time, and through equitable implementation. The Salinity Plan discusses "establish[ing] a timetable to carry out best practical management of resources and uses thereof; . . . identify[ing] . . . time schedules for planning and construction to achieve best practicable management." (*Id.* at iv, 7-1.) The Salinity Plan also discusses the dissolved oxygen objective in a context of concern for flexibility and equitable application. Noting the relationship of low dissolved oxygen to increased temperature and low river flow, the plan discusses monitoring, installation of rock barriers, and improved treatment of cannery wastes as means available to assist in maintenance of a dissolved oxygen level of 6.0 mg/l or better in the San Joaquin River near Stockton. (*Id.*

at 5-23.) The Salinity Plan reserved the right to alter the water quality objectives “when appropriate.” (*Id.* at 6-18.) The Salinity Plan is internally flexible. This feature is inherent since the plan expressly postponed a portion of its implementation program until the water rights phase, when water quality objectives “measures requiring water allocation adjustments [would] be determined.” (*Id.* at 7-1.)

In light of the existing flexible approach inherent in the current Salinity Plan, no inconsistency will result if SWRCB adopts amendments expressly articulating its intention to permit flexibility in attaining the water quality objectives. The Delta Plan should be amended to expressly permit schedules of compliance for dischargers.

IV. AMENDING THE PLAN TO AUTHORIZE COMPLIANCE SCHEDULES EXPLICITLY WOULD ASSIST RWQCB AND SWRCB

The Delta Plan should be revised to authorize compliance schedules for attaining dissolved oxygen in order to clarify the authority of the RWQCB to grant NPDES permits that include compliance schedules for attaining water quality objectives. In Stockton’s case, the Central Valley Regional Water Quality Control Board experienced difficulty in crafting Stockton’s renewed permit, as it attempted to balance Stockton’s excellent record of past compliance with recent legal interpretations and the virtual certainty that the new limitations, once incorporated in Stockton’s effluent limitations, would immediately be exceeded. Not in agreement with Stockton’s legal position regarding existing authority to include a compliance schedule in the permit, the RWQCB declined to include a schedule. It instead considered the inclusion of a schedule in a cease and desist order. Stockton opposed this

action and believes that a cease and desist order is unduly harsh and unjustified. Such an order would also leave Stockton vulnerable legally, and may adversely affect the City's ability to finance new facilities.

In short, the SWRCB can untie the RWQCB's hands by specific authorization for schedules in permits. It can also, perhaps, reduce the need for resource-consuming administrative appeals that may not advance the public interest.

CONCLUSION

The SWRCB may revise the Delta Plan so as to authorize schedules of compliance to be included in NPDES permits and WDRs with respect to dissolved oxygen objectives. Such a revision would alleviate uncertainty such as that faced by the Central Valley Regional Water Quality Control Board in renewing Stockton's NPDES permit. Moreover, Stockton's proposed revision would conform to the SWRCB's longstanding policy of applying its water quality planning objectives in a fair and equitable manner, and with the degree of flexibility that allows dischargers a reasonable opportunity to comply.

Exhibits

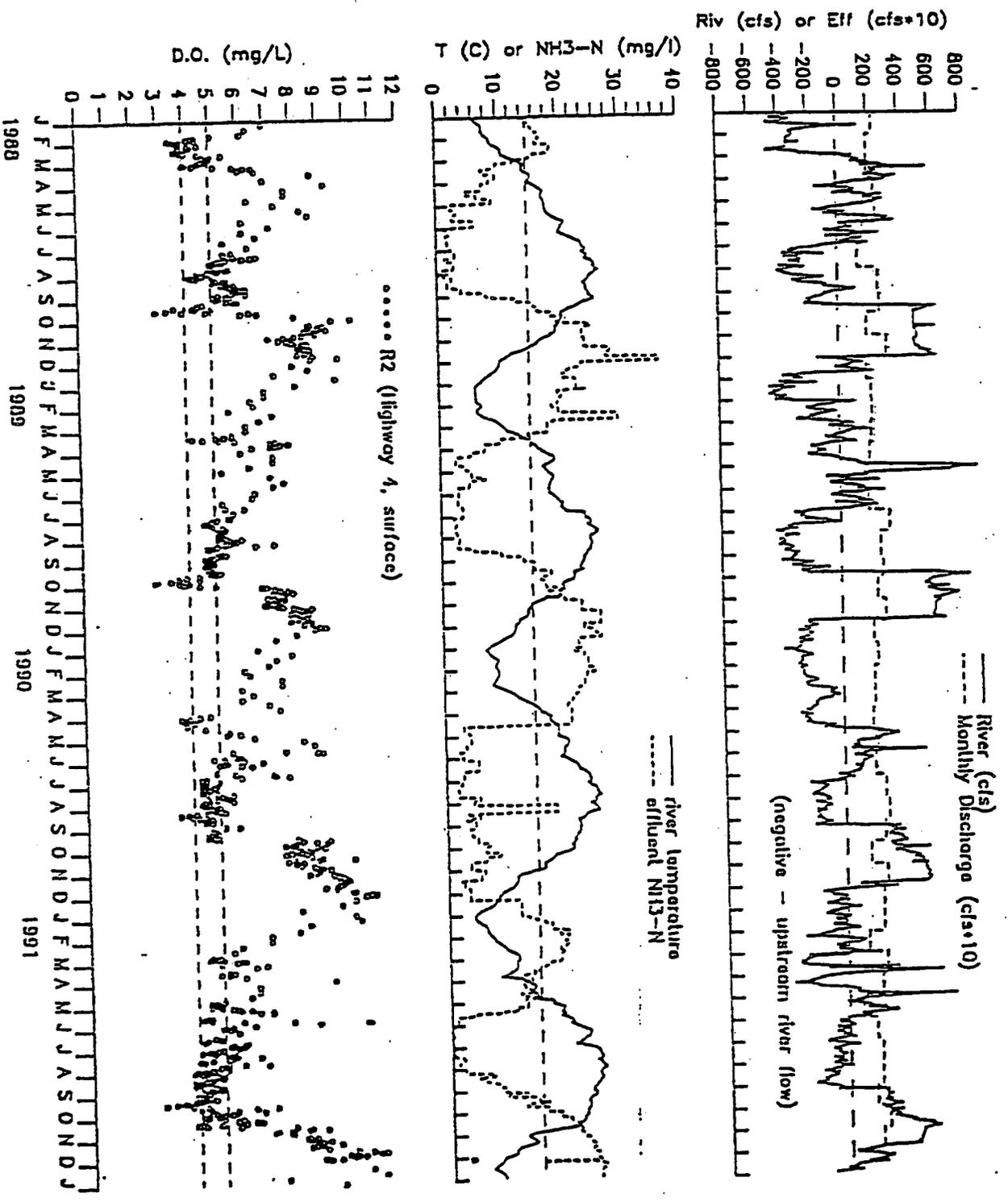
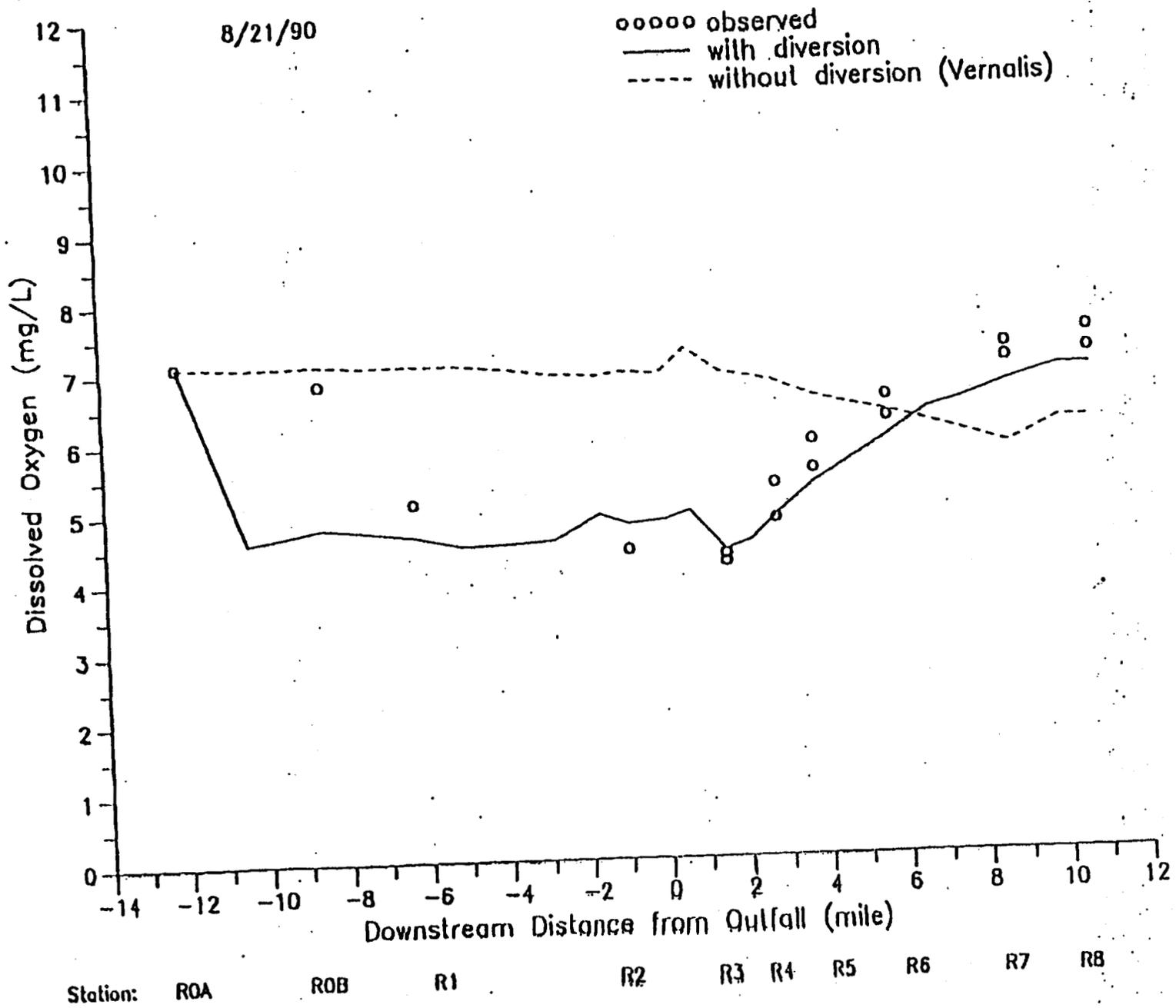
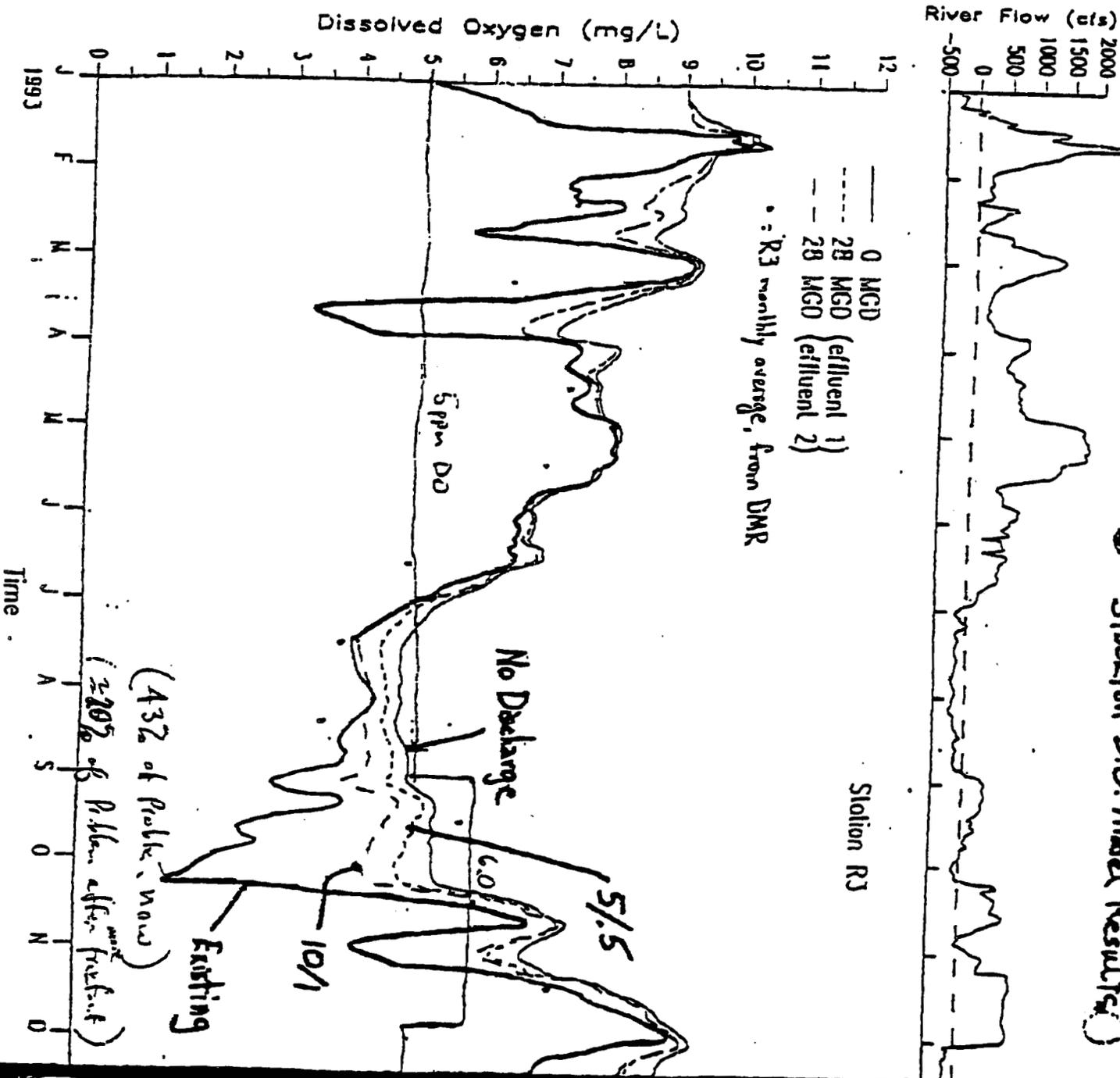


Figure 1. Seasonal Variation of Dissolved Oxygen at Station R2 1988-91 (also included: seasonal changes in river flow and temperature, discharge rate and ammonia concentration of effluent)





Stockton D.O. Model Results

Figure 6-3. Projected Water Quality Response to Zero Discharges and 28 MGD of Provenant Treatment

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September 13, 1994

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**NPDES PERMIT NEGOTIATIONS: REQUEST FOR COMPLIANCE
SCHEDULE; REGIONAL WASTEWATER CONTROL FACILITY, STOCKTON
SAN JOAQUIN COUNTY**

We have reviewed the rationale provided by your staff to justify imposition of a Cease and Desist Order instead of the more common Schedule of Compliance in our revised Order which implements new provisions of the *Salinity Plan*. Staff has correctly noted that a Schedule of Compliance can only be allowed if rules or regulations "can fairly be construed as authorizing a Schedule of Compliance." Apparently, your staff has performed only a limited review of the *Salinity Plan* to determine if authorization for such a schedule could be "fairly construed". We would like to point out that recent Federal guidance has clarified that the *Starkist* decision allows a Schedule of Compliance to be included if authorized in any of the following areas: (1) statute; (2) permit rule; (3) standards rule; or (4) basin plan. The Board staff's preliminary response apparently did not consider all of the areas that may authorize a Schedule of Compliance.

Based upon our review of statutory, as well as regulatory, authority, the Regional Board has ample authority to issue a Schedule of Compliance as part of the City's permit and to extend the period in which the regulation will take effect. Because our conclusions differ from your staff on this point, our analysis of this issue is discussed below.

Federal Policy Guidance on *Starkist*

EPA's whole Effluent Toxicity ("WET") Control Policy (July 7, 1994) provides the Federal government's most recent policy statement on the topic of "Compliance

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SAN JOAQUIN COUNTY**

interpretation of the *Starkist* decision referred to in your letter. EPA's policy statement makes it clear that NPDES permits may contain Schedules of Compliance in certain circumstances, and the authority to allow schedules may be contained in several different areas. The policy details the two relevant requirements which we believe apply to Stockton's situation:

- (1) the permit effluent limitation must be based either on a post-July 1, 1977 State water quality standard or a new or revised interpretation of a pre-July 1, 1977 State water quality standard; and
- 92) the applicable State water quality standard or implementing regulations must explicitly authorize Schedules of Compliance.

WET Policy at 12. EPA's policy discussion further clarifies that Compliance Schedules may be authorized by "the State statute or water quality standards, water quality planning or NPDES regulations." WET Policy at 12. The more stringent limitations placed in this permit result from the *Salinity Plan* and the Board's interpretation of new water quality criteria (ammonia and chlorine). Because the effluent limitations in question are based on new standards or revisions of old standards, and because, as shown below, the State of California authorized such Schedules of Compliance, we believe these conditions have been met.

Analysis of Applicable California Law and Regulations

A. Statutory Authorization

The *Porter-Cologne Water Quality Act*, California's water quality enabling statute, uses broad language to incorporate the key requirements of EPA's program at the State level with the objective of obtaining primary enforcement authority. Chapter 5.5, entitled, *Compliance with the Provisions of the FWPCA of 1972*, incorporates provisions of the Federal *Clean Water Act* by reference. This includes enactment of a State authorization to create an NPDES permitting program that qualifies for EPA approval. § 13370.5(a).

Article 3 of the Act provides for the development of Regional Water Quality Control Board plans to be adopted by each Regional Board. Under this planning provision, there is a section which specifically requires the use of time schedules to implement water quality objectives.

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The program of implementation for achieving water quality objectives shall include but not be limited to: . . .

(b) A time schedule for the actions be taken.

Porter-Cologne Water Quality Act § 13242(b) (emphasis supplied).

B. Water Quality Standards Authorization

The *California Water Quality Regulations*, like the *Porter-Cologne Water Quality Act*, also provide an opportunity for Regional Boards to establish compliance through time schedules. Article 2 § 2231 specifically provides that "time schedules should be included in the requirements for existing discharges when it appears that the discharger cannot immediately meet the requirements."

C. NPDES Rule Authorization

California has not adopted its own NPDES rules but instead has incorporated by reference the Federal NPDES rules. *California Waste Regulation, Title 23, Division 3, Chapter 9 § 2235.2* Part 122 of the *Code of Federal Regulations* implements the *Clean Water Act's* ("CWA") provisions involving administration of the NPDES permitting system. The section entitled "Schedules of Compliance" (40 C.F.R. § 122.47), specifically authorizes State permits to establish a schedule for compliance with the CWA and regulations. Having incorporated this provision by reference, applicable State NPDES rules provide that Schedules of Compliance are authorized.

D. Basin Plan Authorization/Analysis of the Salinity Plan

The *Water Quality Control Plan for Salinity*, May 1991, 911-15 WR, clearly recognizes an implementation plan for the water quality objectives is required. Because Water rights issues will impact the achievement of the objectives, the implementation cannot be fully completed until this aspect of the Plan has been resolved. Therefore, the Schedule for Compliance (implementation) is left open pending completion of the water rights phase of the Plan. § 1.0, Executive Summary.

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**NPDES PERMIT NEGOTIATIONS: REQUEST FOR COMPLIANCE
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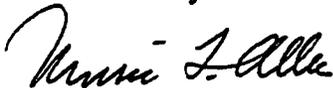
Until the water rights issues are resolved, the objectives of the Plan are in reality goals. Because of the importance of the amount and timing of flows in the river, the timing and allocation of responsibility for achieving the objectives cannot be made yet. Because the need for implementation schedules for all activities is recognized (*i.e.*, as soon as possible), the *Salinity Plan* may be "fairly construed" to allow Schedules of Compliance.

Justification for a Schedule of Compliance

Stockton qualifies for a Schedule of Compliance because State statutes and regulations, as well as the *Salinity Plan*, provide for an implementation plan. The implementation plan contained in the *Salinity Plan*, recognizes that some time is required to achieve the newly revised objectives.

Starkist allows a Schedule of Compliance to be included in an NPDES permit or Waste Discharge Requirements if: (1) addressed in State law, regulations, water quality objectives, or basin plans; and (2) the water quality objective is new or a revision of a previous objective. Stockton believes that both prongs of the *Starkist* test are satisfied and, therefore, a Schedule of Compliance is not only allowed, but most appropriate.

We look forward to your reconsideration of our request for a Schedule of Compliance. Please call if you have any questions regarding this matter.



MORRIS L. ALLEN
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